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IN THE

Supreme Court of the United States

October Term, 1968

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION,
LONG BEACH LOCAL No. 1-128,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
and
MACMILLAN RING-FREE OIL COMPANY, INC.,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
The Facts As Found By The Board	4
The Board's Conclusions	9
The Decision Of The Court Of Appeals	12
REASONS FOR GRANTING THE WRIT	14
CONCLUSION	28

TABLE OF CITATIONS

Cases:

Banner Die Fixture Co., 109 N.L.R.B. 1401 (1954), 115 N.L.R.B. 1692 (1956), enforced, 42 L.R.R.M. 2604 (6th Cir. 1958)	25
Bowen Products Corp., 113 N.L.R.B. 731 (1955)	26
Dan River Mills, Inc., 125 N.L.R.B. 1006 (1959)	25
FTC v. Cement Institute, 333 U. S. 683 (1948)	14
General Teamsters Union, Local 912, 120 N.L.R.B. 1577 (1958)	25

Page

Greenville Cotton Oil Co.,
92 N.L.R.B. 1033 (1950), affirmed sub. nom.,
American Fed. of Grain Millers v. NLRB, 197
F.2d 451 (5th Cir. 1952) 20-21

International Union, United Automobile Workers
v. NLRB, 363 F.2d 702 (D.C. Cir. 1966) cert.
denied, 385 U. S. 973 (1966) 19-20, 22

Local 269, Int'l B'hd of Elec. Workers,
149 N.L.R.B. 768 (1964), enforced, 357 F.2d
51 (3rd Cir. 1966) 26

Local 1424, Int'l Ass'n of Machinists v. NLRB,
362 U. S. 411 (1960) 4, 9, 13, 14-17, 18, 23

News Printing Co.,
116 N.L.R.B. 210 (1956) 23-24, 25

Newton Falls Paper Mill, Inc.,
144 N.L.R.B. 1470 (1963) 25

NLRB v. American Aggregate Co.,
305 F.2d 559 (5th Cir. 1962) 21-22

NLRB v. Brown & Root, Inc.,
203 F.2d 139 (8th Cir. 1953) 21

Paint, Varnish & Lacquer Makers Union,
120 N.L.R.B. 1425 (1958) 25

Paramount Cap Mfg. Co.,
119 N.L.R.B. 785 (1957), enforced, 260 F.2d
109 (8th Cir. 1959) 24-25

Philip Carey Co. v. NLRB,
331 F.2d 720 (6th Cir. 1964), cert. denied,
379 U. S. 888 (1964) 21

Sheet Metal Workers' Int'l Ass'n v. NLRB,
293 F.2d 141 (D.C. Cir. 1961), cert. denied,
368 U. S. 896 (1961) 17-18

Swift Service Stores, Inc.,
169 N.L.R.B. No. 33, 67 L.R.R.M. 1181
(Jan. 26, 1968) 27

Page

Tennessee Knitting Mills, Inc.,
88 N.L.R.B. 1103 (1950) 23-24

Universal Oil Products Co.,
108 N.L.R.B. 68 (1954) 23-24

Statutes:

National Labor Relations Act

§8(a)(2), 29 U.S.C. §158(a)(2) 23

§8(a)(3), 29 U.S.C. §158(a)(3) 20

§8(a)(5), 29 U.S.C. §158(a)(5) 2

§8(b)(4), 29 U.S.C. §158(b)(4) 17

§8(d), 29 U.S.C. §158(d) 3

§10(b), 29 U.S.C. §160(b) 3, 4, 14-28

28 U.S.C. §1254(1) 2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision and decree rendered herein by the United States Court of Appeals for the Ninth Circuit on April 10, 1968, and May 1, 1968, respectively.

OPINIONS BELOW

The opinion of the court below is reported at 394 F.2d 26, and is reproduced in the separately bound Appendix to this Petition (hereinafter cited as "App.") at page 1. The

Decision and Order of the National Labor Relations Board, including the Trial Examiner's Decision which the Board adopted, is reported at 160 N.L.R.B. 877, and is reproduced at App. 18.

JURISDICTION

On April 10, 1968, the court below issued an opinion holding that the order issued in this case by the National Labor Relations Board should be enforced only in part, and that the remaining portions of the order should be set aside. On May 1, 1968, the court entered a decree in accordance with its opinion, enforcing only a part of the Board's order (App. 15). On June 24, 1968, Mr. Justice Douglas entered an order extending the time within which this Petition might be filed to and including July 30, 1968. This Court has jurisdiction to review the judgment of the court below by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Where the National Labor Relations Board has found, on substantial evidence, that an employer failed to bargain in good faith in the six-month period preceding the filing of an unfair labor practice charge, may a court of appeals set aside the Board's decision solely because the unlawful purpose and character of the employer's conduct within the six-month period was established primarily by examining it in the light of the history of the entire negotiations, which had commenced more than three years prior to the filing of the charge?

STATUTES INVOLVED

Section 8 of the National Labor Relations Act, 29 U.S.C. § 158, provides in pertinent part as follows:

> (a) It shall be an unfair labor practice for an employer –
>
> * * * * *

(5) to refuse to bargain collectively with the representatives of his employees. . .

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement. . .

Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), provides in pertinent part as follows:

"Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect . . . Provided, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . .

STATEMENT OF THE CASE

On November 10, 1964, after more than three years of fruitless collective bargaining, Petitioner (hereinafter referred to as the Union) filed an unfair labor practice charge against Respondent MacMillan Ring-Free Oil Company (hereinafter referred to as the Company), alleging a refusal to bargain in good faith. The National Labor Relations Board reviewed the entire record of the negotiations, and found that the Company had not bargained in good faith at any time, including during the six months prior to the filing of the charge. The court below set aside the Board's decision on the ground that the finding of bad faith was

supported primarily by evidence of events which had occurred outside the six-month limitation period prescribed by Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b).

This case thus squarely presents the question which this Court expressly left open in *Local 1424, Int'l Ass'n of Machinists v. N.L.R.B.*, 362 U.S. 411, 421-22 (1960)-whether a finding that a unfair labor practice has been committed within the limitations period can be sustained where "the merit of the allegations in the complaint is shown largely by reliance on earlier events."

In order to understand the decision of the court of appeals, it is necessary to review the findings of fact on which the Board based its conclusion that the Company had failed to bargain in good faith. We turn, therefore, to a summary of those findings.[1]

The Facts As Found By The Board

At the time this case arose, the Union was the collective bargaining representative of the production, maintenance, and plant clerical employees at the Company's oil refinery at Signal Hill, California.[2] The parties' first collective

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[1] Although there were many factual issues in dispute before the Board and in the court below, the court did not disturb any of the Board's fact findings, and the Union does not challenge any of them here. It should also be noted that there are a number of factual issues discussed in the Board's decision which relate to violations other than the alleged refusal to bargain in good faith, or which relate to defenses raised by the Company other than the defense based on Section 10(b) of the Act. Since this Petition is directed solely to the court's refusal, on the basis of Section 10(b), to affirm the Board's finding of a failure to bargain in good faith, we will summarize only those findings of fact which are relevant to that issue.

[2] The Board actually found that the Union's parent organization, Oil, Chemical and Atomic Workers International Union, was the bargaining agent (App. 27), but for present purposes the Local and its parent International can be treated as one.

bargaining agreement was executed on November 18, 1960 (App. 24), and was terminated by mutual agreement on June 13, 1961. The parties agreed at that time to "meet as quickly as possible for the purpose of negotiating a new agreement." (App. 29)

At the outset of the negotiations, the Union proposed that the parties readopt their prior agreement, with a single amendment to provide four rather than three weeks of vacation to employees with twenty or more years of service (App. 30). The Company rejected this proposal, and on July 27, 1961, tendered its own draft of a proposed agreement (App. 30-31).

The Company's proposal contained a number of drastic departures from the terms of the parties' prior agreement, all of them detrimental to the Union and the employees. For example, the Company's proposal would have eliminated the checkoff of Union dues, replaced the former "union shop" provision with a "maintenance of membership" clause, deleted a provision for compensating employees for time spent in processing grievances or participating in collective bargaining negotiations, and imposed greater restrictions on leaves of absence for Union business. It would also have authorized the Company to discharge or discipline employees for any of thirty-five specified "rule infractions" without recourse by the Union or the employees to the grievance procedure or arbitration. In addition, the proposal would have sharply reduced the circumstances in which the Company would have to pay premium wage rates for shift work or work on a regularly scheduled day off, and would have increased management's unilateral authority to subcontract work or to layoff, promote or recall employees without regard to their seniority. Finally, the Company proposed substantial changes in the no-strike clause, including the deletion of language which allowed employees to refuse to work under unsafe conditions (App. 30-33).

Not surprisingly, the Union was unwilling to agree to these terms, but the Company refused to recede from

them and the negotiations dragged on for more than a year without any discernible progress.

There was no change in the Company's position until October 18, 1962, when it submitted a second proposal which was even less acceptable to the Union than its earlier one. This draft omitted even the "maintenance of membership" provision of the prior proposal, and provided instead for an "open shop." It also omitted the provision which had been contained in both the prior agreement and in the Company's prior proposal, providing that discharge or disciplinary action "shall be only for just cause." Finally, it contained a new provision, not found either in the prior agreement or in the Company's prior proposal, which stated that "where arbitration is sought and the Company claims the matter is not subject to the arbitration provisions of this Agreement, then the matter of arbitrability shall first be decided by a court of law." In all other respects, the Company's proposal of October 18, 1962, was substantially identical to its prior proposal (App. 36).

At some point in 1962 – the precise date does not appear in the record – the parties agreed to defer any discussion of wages until the negotiations in the oil industry, which were then in progress, had reached the point of establishing an industry wage pattern. By January, 1963, such a pattern apparently had emerged, and the parties then agreed to a 5% wage increase (App. 38). The parties remained deadlocked, however, on the other issues in dispute. Five further meetings in 1963 produced no progress toward settlement (App. 39).

At a meeting on December 13, 1963, the Union asked the Company whether it would submit "a final proposal." The Company replied that it was not ready to do so at that time, but that it would prepare such a proposal and contact the Union "right after Christmas" to schedule a meeting (App. 39).

The Company did not contact the Union as it had promised. Instead, on February 27, 1964, the Company distributed to all the employees a letter, nominally

addressed to the Union, stating that as part of its "policy" to "improve its employee program," it had decided to grant a four-week vacation to all employees with 20 years or more of service (App. 40). This action was taken entirely unilaterally, without any prior notice to or discussion with the Union. The letter did not mention the fact that the Union had proposed this identical vacation improvement at the beginning of the negotiations. It simply stated:

> "Unless we hear from you to the contrary, we shall assume this change in employees' benefits meets with your approval. However, should you not wish for MacMillan to grant this new benefit, please advise us and we will be happy to discuss the matter with you." (Gen. Counsel Ex. 3(1).)

Since the Union itself had originally proposed this benefit, the employees readily accepted it, and, at the Union's request, it was reduced to writing in a signed letter of agreement on March 3, 1964 (App. 41).

By March 18, 1964, the Union had still heard nothing from the Company concerning its "final proposal" or the resumption of bargaining. It therefore submitted to the Company on that date a new written proposal of its own. In response, the Company, in a letter dated March 30, stated that it needed time to study the Union's new proposal and would communicate further with the Union when it had done so. By late April, 1964, the Union had heard nothing further, and it therefore called the Company to request a meeting. As a result, the parties held their first bargaining meeting in more than five months on May 7, 1964 (App. 41).

This meeting was devoted primarily to a discussion of the Union's proposal. At the end of the meeting, the parties agreed to defer further discussions until after a settlement in the new round of industry-wide negotiations, which were then either in progress or imminent (App. 42).

By September, 1964, a pattern had emerged from these renewed industry negotiations, and, at the Union's request, a bargaining session was scheduled for September 2, 1964 (App. 45). Just prior to the meeting, the Union negotiating committee decided that in light of the fact that the Company had still not submitted the contract proposal it had promised to send "right after Christmas," the negotiations ought to be brought "to a head." Accordingly, the committee decided to call a strike on September 8, if no adequate progress was made in the negotiations by that date (App. 46).

At the meeting of September 2, 1964, the Union asked the Company for the "final proposal" which had been promised at the meeting of December 13, 1963. The Company responded by giving the Union a draft of a contract which was in all material respects identical to the Company's prior proposal of October 18, 1962. After examining the draft, the Union informed the Company that it was no more acceptable than its prior proposal, and that unless an agreement was reached by September 8, the Union would strike (App. 46-47).

The parties met again on September 4, 1964, with a federal mediator, but no progress toward agreement was made (App. 51). There were no further meetings prior to the strike, which commenced as scheduled on September 8. The strike was still in progress at the time of the hearing in this case in November, 1965.

The parties continued to meet during the strike, but the Company adamantly adhered to its position. Indeed, at a meeting on December 4, 1964, the gulf between the parties was widened even further as a result of a new Company proposal which would have required the Union, in any future strike, to pay the strikers the full wages they would otherwise have earned.[3] The Union rejected this proposal

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[3] This proposal read as follows: "The Union agrees that any time a strike, work stoppage, or interruption of work or other concerted activity occurs by the employees covered hereunder during the term

(footnote continued on page 9)

with the comment that it knew of no union in the United States that could possibly agree to such a provision.

The Union indicated a willingness to meet again promptly, but the Company said that it would be unavailable until after the Christmas-New Year holidays (App. 55).

The parties met on six different occasions between January 12, 1965 and April 2, 1965, but no substantial progress was made in these meetings, nor was there any change in the Company's position on any of the issues in dispute (App. 55-57). No further meetings were held after April 2, 1965.

The Board's Conclusions

The Board recognized that the ultimate question to be decided was whether the Company failed to bargain in good faith in the six-month period preceding the filing of the charge. It held, however, citing this Court's decision in *Local 1424, Int'l Ass'n of Machinists v. NLRB*, 362 U.S. 411, 416 (1960), that the parties' prior discussions and contract proposals could be considered "to shed light on the true character of matters occurring with the limitation period." (App. 30.) Accordingly, it based its decision on an examination and analysis of the Company's conduct and attitude throughout the entire period of the negotiations.

After reviewing in detail the Company's contract proposals, and the explanations offered by the Company for its adamant insistence upon so many drastic revisions of the parties' prior agreement, the Board concluded that the Company's real negotiating aim

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(continued from page 8)

of this agreement or within one (1) year from its termination, the Union shall pay each striking employee eight (8) hours per day and forty (40) hours per week at his then hourly wage rate for all the time he is on strike, including time and one-half (1½) for all hours spent picketing in excess of eight (8) hours per day and forty (40) hours per week with double (2) time for Sunday and holiday picketing." (App. 54-55)

"... was to prevent the conclusion of a 'new labor agreement,' and the purpose appears clearly in the Company's negotiating tactics directed to matters of vital importance to the International's representative status and capacity. The basic method used was not to retain as much as possible of the 1960 contract, as Becker claims in his testimony, but to take away much, by omission or substitution, related to that capacity (not to speak of the scaling down of employees' benefits); to inject proposals into the negotiations carrying an aura of inhibition upon the International and the employees it represents, and then increase the climate of inhibition and disparagement of the bargaining representative, as the meetings and years wore on, with the injection of additional restrictive proposals that, especially in the light of prior discussions, were predictably unacceptable to the Union, and foreseeably productive of deadlock." (App. 81-82.)

The Board found further evidence of the Company's bad faith in the fact that it repeatedly delayed the negotiations by the use of dilatory tactics. In addition, the Board found it significant that when the Company finally decided to grant the vacation improvement which the Union had requested, it did so in a manner which would "reasonably lead employees represented by the International, even if they had prior knowledge of its vacation proposal, to believe that the benefit was an act of grace by the Company 'for all MacMillan employees' in pursuit of its 'policy,' rather than the product of the International's representation." (App. 68).

The Board summarized its conclusions on the issue of the Company's refusal to bargain in good faith as follows:

"Summarizing the matter, the Respondent's bad faith in the negotiations is abundantly established by the evidence of a purpose to

prevent agreement through its progressive injection into the negotiations, as time went on, of mounting proposals for inhibition of the International's representative capability and status; the method used in 1964 to announce and put into effect the vacation benefit proposed by the Union almost 3 years earlier; and the Company's foot-dragging in arranging a meeting and submitting a 'final proposal' following the session of December 13, 1963, as evidenced by the broken promises to arrange one made at that session, and in the Company's letter of March 30, 1964, by the fact that no meeting was held between December 13, 1963, and May 7, 1964, and then only upon the Union's initiative, and by the Company's failure to submit a 'final proposal' until September 2, 1964 (which, apart from the oral 4½-percent offer that followed the industry's bargaining pattern in amount, was substantially the same, for all practical purposes, as its contract proposal in 1962.)" (App. 89-90).

On the issue of whether the Company's unfair labor practices had occurred within the six month period prior to the filing of the charge, the Board found it to be "abundantly clear"

". . . that the Respondent's negotiating attitude and goals regarding 'a new labor agreement' have not been materially different within the 6-month period preceding the filing and service of the charge, and since then, including the period since the current strike began, from what they were prior to May 10, 1964, evidencing the same design to frustrate the bargaining process and prevent the conclusion of such an agreement, and by the same methods, exemplified by continued insistence, within the 6-month period, and since, upon propositions born of that design and variously embodied in the Company's con-

tract proposals of July 27, 1961, October 18, 1962, and September 2, 1964; and by the proposal of December 4, 1964." (App. 90-91).

The Board further found that "the origin of the strike, and its prolongation, are rooted in Respondent's conduct aimed at preventing 'a new labor agreement' to replace the 1960 contract" (App. 90).

Accordingly, it held that the strikers were entitled to reinstatement upon their unconditional request and that the Company was obligated to discharge any strike replacements it may have hired if such action was necessary to provide reinstatement to the strikers (App. 98, 101).

The Decision Of The Court Of Appeals

The Court below acknowledged that "the long history of the parties' negotiations, heavily relied upon by the Board, casts a certain amount of doubt on the good faith of the company" (App. 7). By way of illustration, the court cited, as indicia of the Company's bad faith, the fact that it had "moved with a pronounced lack of promptness in certain portions of the negotiations," the fact that it had unilaterally announced the improved vacation benefit "in a manner and using language calculated to raise doubts in the minds of the employees as to whether the union was effectively representing them," and the fact that the Company was "to some extent contradictory and evasive when responding to questions concerning the reasons for some of [its] more severe proposals" (App. 7-8).

The court emphasized, however, that the ultimate question presented was whether the Company had failed to bargain in good faith after May 10, 1964, which was the beginning of the 6-month period of limitations. It noted that because the parties had suspended their negotiations from May 7, 1964 to September 2, 1964, to await the outcome of the industry negotiations, the only significant event which had occurred between May 10, 1964 and the

commencement of the strike was the negotiating session of September 2, 1964 (App. 4). Although at that meeting the Company had resubmitted as its "final proposal" the same proposed contract which the Board found was deliberately designed to frustrate the negotiations, the court said that the Company's conduct on September 2, "standing alone . . . is plainly insufficient to support the Board's conclusion that the company violated section 8(a)(5)" (App. 4).

The Court also referred to the proposal tendered by the Company on December 4, 1964, while the strike was in progress, which would have required the Union to pay strikers their full wages in any future strike. The Court recognized that "the extreme or bizarre character of a party's proposals" may be evidence of a lack of good faith, but held that this single proposal, since it was only mentioned on one occasion, could not in itself support the Board's decision (App. 5-7).

The court therefore concluded that the events subsequent to May 10, 1964, when viewed in isolation, were insufficient to support the Board's unfair labor practice finding. It thus became necessary for the court to determine whether the inference drawn from events which occurred prior to May 10, 1964, could properly be relied upon to support the Board's finding that the Company had failed to bargain in good faith after that date.

In search of guidance on this issue, the court examined in detail the decision of this Court in *Local 1424, Int'l Ass'n of Machinists v. NLRB*, 362 U.S. 411 (1960). The court acknowledged that the *Machinists* case was "not directly in point," and had in fact "expressly refrained from passing judgment" on the question presented here. Nevertheless, the court, while admitting that "the question is not without difficulty," concluded that "the thrust of the Court's reasoning" in that case required reversal of the Board's decision in the present case (App. 11-12).

The Court conceded that evidence antedating the limitations period can be relied upon to "shed light" on more recent events, but held that "the evidence of a

violation drawn from within that period must be reasonably substantial in its own right" (App. 13-14).

REASONS FOR GRANTING THE WRIT

Introduction

Twenty years ago, this Court reaffirmed "the established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the transactions under scrutiny." *FTC v. Cement Institute*, 333 U.S. 683 (1948). Both the National Labor Relations Board and the courts of appeals have long struggled with the question of whether, and to what extent, this principle permits reliance on events which occurred outside the six-month limitations period prescribed by the National Labor Relations Act to determine whether an unfair labor practice has been committed within that period.

One aspect of that problem was before this Court in *Local 1424, Int'l Ass'n of Machinists v. NLRB*, 362 U.S. 411 (1960). In that case, a union and an employer had entered into a collective bargaining agreement at a time when the union represented less than a majority of the employees involved. More than six months after the execution of the contract, a charge was filed alleging that the union's original lack of a majority rendered the contract itself unlawful, and that the continued enforcement of the contract was therefore an unfair labor practice. Aside from the circumstances of its original execution, the contract was entirely valid and lawful. Nevertheless, the Board had held that the mere existence of the contract was a "continuing violation," and that the charge was therefore timely even though it was filed more than six months after the date on which the contract was first executed. This Court reversed, holding that the

six-month limitations period had begun to run upon the execution of the contract, since the union's lack of majority status at that time was the real basis for the charge.

In reaching this result, the Court distinguished between two different kinds of situations:

> "The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10(b) does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely 'evidentiary,' since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice." (*Id.* at 416-17)

The Court concluded that the case before it fell into the second of these two categories, "for the entire foundation of the unfair labor practice charge was the Union's time-barred lack of majority status when the original collective bargaining agreement was signed." *Id.* at 417.

The present case, on the other hand, falls into the first category. Here the charge alleged, and the Board found, that the Company had failed to bargain in good faith within the six-month limitations period. Such conduct, in and of itself, constitutes an unfair labor practice, without

regard to any prior act or event. However, in order to determine the "true character" of the Company's conduct within the limitations period — *i.e.*, whether it was acting in good faith or in bad faith, whether it was bargaining with a sincere desire to reach an agreement or with the object of avoiding agreement — the Board reviewed the whole history of the parties' relationship, and particularly the history of the negotiations. On the basis of its review of the Company's entire course of conduct, the Board concluded that the Company had failed to bargain in good faith throughout the negotiations, both before and during the six-month period preceding the filing of the charge, and thereafter.

The Court below did not dispute the contention that the record in this case, viewed as a whole, "would provide a sufficient foundation for the Board's finding of a refusal to bargain" (App. 9). It also acknowledged that "the violation found by the Board 'occurred' within the specified six-month period before the filing of the charge." (App. 9). Nevertheless, it held that the Board's finding could not stand, because it was based primarily on inferences drawn from evidence of events which had occurred prior to the limitations period.

The question thus presented was adverted to by this Court in the *Machinists* case, but the Court expressly refrained from deciding it at that time:

> "Indeed, some Board cases have . . . held § 10(b) a bar in circumstances when, although none of the material elements of the charge in a complaint need necessarily be proved through reference to the barred period — so that utilization of evidence from that period is ostensibly only for the purpose of giving color to what is involved in the complaint — yet the evidence in fact marshalled from within the six-month period is not substantial, and the merit of the allegations in the complaint is shown largely by reliance on earlier events. News Printing Co., 116

N.L.R.B. 210, 212; Universal Oil Products Co., 108 N.L.R.B. 68; Tennessee Knitting Mills, Inc., 88 N.L.R.B. 1103. However, we express no view on the problem raised by such cases, for here we need not go beyond saying that a finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the § 10(b) proviso." 362 U.S. at 421-22.

The question which this Court thus left open in *Machinists* is now squarely presented by this case. As we shall demonstrate below, it has repeatedly arisen in a variety of contexts, and has led to conflicting and inconsistent decisions by both the courts of appeals and the Board. Since this is an issue of fundamental importance in the administration of the Act, it should now be settled by this Court.

I

The decision of the Court below is in direct conflict with decisions of other courts of appeals. For example, in *Sheet Metal Workers' Int'l Ass'n v. NLRB*, 293 F.2d 141 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 896 (1961), the court was confronted with a Board finding that a union had violated Sections 8(b)(4)(B) and (C) of the Act, 29 U.S.C. §§ 158(b)(4)(B), (C), by inducing employees of certain other employers to refuse to handle or install products manufactured by Burt Manufacturing Company. Under the statutory provisions involved, such conduct would constitute a violation only if "an object thereof" was to force Burt "to recognize or bargain with" the union. Although the allegedly unlawful conduct occurred within the limitations period, "the Board's finding that an object of petitioners' conduct was to compel Burt to recognize Local 70 was based *exclusively* on evidence of events antedating December 5, 1956," the date on which the six-month period commenced. *Id.* at 146 (emphasis added).

The union in that case, like the Company here, argued that the Board may not rely wholly on events which occurred outside the six-month period even to prove the unlawfulness of conduct occurring within that period. The District of Columbia Circuit, however, unlike the Ninth Circuit in this case, held to the contrary. After reviewing and quoting at length the opinion of this Court in the *Machinists* case, the court concluded:

> "In this case the Board has relied upon events occurring prior to the limitation period to 'shed light on the true character' of the objective of petitioners' conduct within that period. Thus, such events are 'merely evidentiary.' As such, they are admissible in support of charges under 8(b)(4)(B) and (C) and their probative weight is for the Board's determination .... It follows that the Board's finding that an object of the Local's conduct was to obtain recognition is supported by substantial evidence." *Id.* at 147.

The issue in that case is strikingly similar to the question presented here. In both cases, the legality of conduct occurring within the six-month period depended entirely on its "object" or purpose. In the *Sheet Metal Workers* case, the question was whether the "object" of certain actions taken by the union within the six-month period was to force Burt Manufacturing Company to recognize and bargain with it. In the present case, the issue was whether the "object" of the Company's bargaining activities within the six-month period was to frustrate the negotiations and prevent the consummation of an agreement. In both cases, the Board found the unlawful object on the basis of evidence which antedated the limitations period. The District of Columbia Circuit held that it was proper for the Board to rely on such evidence, the Ninth Circuit held that it was not. Both courts relied on their respective interpretations of the opinion of this Court in the *Machinists* case. The conflict could not be more clear.

Another more recent decision of the District of Columbia Circuit is also inconsistent with the result reached in the present case. In *International Union, United Automobile Workers v. NLRB*, 363 F.2d 702 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 973 (1966), an employer, after refusing a union's demand for recognition and bargaining, proceeded to engage in a variety of unlawful activities in an effort to dissipate and undermine the union's support among the employees. The Board found that the union represented a majority of the employees at the time of its original demand for recognition and at all relevant times thereafter, and therefore held that the employer had unlawfully refused to bargain. However, the union's demand for recognition, and the company's express refusal to bargain, had both occurred more than six months prior to the filing of the charge, and were not repeated thereafter. The company therefore argued that the charge, insofar as it alleged an unlawful refusal to bargain, was barred by Section 10(b). The court disagreed and upheld the Board's finding that the company's subsequent conduct constituted a "continuing refusal" to bargain with the union:

> "The Company contends that the continuing offense theory is impermissible in light of Local Lodge No. 1424 International Assoc. of Machinists v. NLRB, 362 U.S. 411, 80 S. Ct. 822, 4 L.Ed.2d 832 (1960). That decision cannot be viewed so broadly. When within the six-month period there has been active conduct, as contrasted with mere passive inaction following an old offense, it is open to the Board to refer to previous acts "to shed light on the true character of matters occurring within the limitations period." 362 U.S. at 416, S.Ct. at 826. In effect what was involved here was a basic Company approach started more than six months prior to the charge, but carried forward by more

> recent actions. The Board in effect viewed the actions within the six-month period as reiterations by deed of the underlying refusal to bargain and hence as establishing a violation of Section 8(a)(5). We think this was within its authority under the Act." *Id.* at 706-707.

This reasoning is plainly at odds with the approach taken by the court below. In the present case, the court held that it was impermissible for the Board to treat conduct occurring within the six-month period as a continuation of "a basic Company approach started more than six months prior to the charge," in the absence of some substantial evidence, drawn from the six-month period itself, that the company was guilty of the unfair labor practice with which it was charged. In the *Auto Workers* case, the actions taken by the company within the six months, although unlawful for other reasons, could not in themselves provide the basis for a finding of an unlawful refusal to bargain. Only when viewed in the light of earlier events was such a finding possible. Nevertheless, the Board made such a finding, and the Court of Appeals in that case sustained it.

Also in conflict with the decision below are the decisions of three other circuits on the question of whether the Board may find an unlawful refusal to reinstate "unfair labor practice" strikers in a situation in which the underlying unfair labor practice which caused the strike occurred more than six months prior to the filing of the charge. The Board has long held that when a strike is caused or prolonged by an employer's unfair labor practice, it is a violation of Section 8(a)(3) of the Act for the employer to refuse to reinstate the strikers upon their unconditional request, even if permanent replacements have been hired in the interim. The Board has also held, however, in a case which arose shortly after the enactment of the limitations proviso of Section 10(b), *Greenville Cotton Oil Co.*, 92 N.L.R.B. 1033 (1950), *affirmed sub.*

nom., American Fed. of Grain Millers v. NLRB, 197 F.2d 451 (5th Cir. 1952), that a charge alleging an unlawful refusal to reinstate unfair labor practice strikers is untimely if filed more than six months after the occurrence of the original unfair labor practice which provoked the strike. Three courts of appeals have disagreed with this view, and have held instead that a charge is timely if filed within six months of the denial of reinstatement.

The first of these decisions was *NLRB v. Brown & Root, Inc.,* 203 F.2d 139, 145-46 (8th Cir. 1953), in which the court expressly disapproved the Board's decision in *Greenville Cotton.* The Board itself had distinguished *Greenville Cotton* on the ground that, in *Brown & Root,* the unfair labor practice which had provoked the strike had been the subject of a separate charge, which had been timely filed and which had been adjudicated in a separate proceeding. The Eighth Circuit, however, expressly disclaimed reliance on this distinction, and instead enforced the Board's decision on the ground that *Greenville Cotton* itself was an "illogical" decision. *Id.* at 145-46.

The Sixth Circuit reached the same result in *Philip Carey Co. v. NLRB,* 331 F.2d 720 (6th Cir. 1964), *cert. denied,* 379 U.S. 888 (1964). The court in that case, after noting the conflict between the Board's decision in *Greenville Cotton* and the Eighth Circuit's decision in *Brown & Root,* held that "the more logical approach" was that reflected in the latter case. *Id.* at 732.

Finally, the Fifth Circuit, which had originally affirmed *Greenville Cotton,* appears to have reversed its position in *NLRB v. American Aggregate Co.,* 305 F.2d 559, 563 (5th Cir. 1962):

> "In a § 8(a)(3) striker reinstatement case the significant thing is not when the strike started, or how long it has gone on. What is important is the status of the returning striker. This is because an employer's responsibility of reinstatement is quite differ-

> ent for those who struck to gain economic bargaining power than it is for those who struck as a protest against an employer's unfair labor practices. Determination of the employees' status must therefore necessarily depend on the causes of the strike. It is inescapable that such evidence will have to go back to the beginning, or at least to the time the character of the strike changed. But § 10(b) does not bar evidence. It bars charges. The charge under review was not the Company's actions giving the strike its unfair labor practice character. It was that, within the 6 months' period, the Company refused to reinstate an employee then having a significant status entitling him to different treatment."

Plainly, the decisions in *Brown & Root, Philip Carey,* and *American Aggregate* are all inconsistent with the decision of the court below in the present case. Indeed, one of the Board's findings in this case was that the strikers here were unfair labor practice strikers entitled to reinstatement upon their unconditional request. The court reversed that finding on the ground that the underlying unfair labor practice itself, although it admittedly occurred within the six-month period, could be established only by reliance upon evidence which antedated that period. In the three cases cited above, on the other hand, the courts held that even if the underlying unfair labor practice itself *occurred* outside the limitations period, the Board could still find that certain strikers were unfair labor practice strikers, and order their reinstatement.[4]

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[4] It should be noted that this Court, in *Machinists,* cited *Greenville Cotton* as one example of a Board decision holding that a charge is barred by Section 10(b) "where the gravamen of the unfair labor practice complained of lay in a fact or event occurring during the barred period." 362 U.S. at 420. It is therefore possible to argue

(footnote continued on page 23)

II

The Board's own decisions have not been consistent on the question presented in this case, and have thus contributed to the present confused state of the law.

In *Machinists* this Court cited three Board decisions as holding that a charge is barred by Section 10(b), even if it alleges a violation occurring within the limitations period, "if the evidence in fact marshalled from within the six-month period is not substantial, and the merit of the allegations . . . is shown largely by reliance on earlier events." This rule, with respect to which this Court expressed "no view," is the one which the Court below applied in the present case.

The three cases referred to were *News Printing Co.*, 116 N.L.R.B. 210 (1956); *Universal Oil Products Co.*, 108 N.L.R.B. 68 (1954); *Tennessee Knitting Mills, Inc.*, 88 N.L.R.B. 1103 (1950). Two of these cases presented a quite different problem than that involved here. Both *Universal Oil Products* and *Tennessee Knitting Mills* involved charges which alleged that the employers had unlawfully assisted or dominated a labor organization in violation of Section 8(a)(2) of the Act, 29 U.S.C. § 158(a)(2). In both cases, the evidence showed considerable unlawful conduct prior to the six-month period preceding the filing of the charge, but no significant *acts* of assistance or domination with that period. The Board concluded in

(continued from page 22)

that this Court has impliedly approved *Greenville Cotton*, and that the court of appeals decisions to the contrary are therefore in conflict with the decision of this Court. On the other hand, since both *American Aggregate* and *Philip Carey* were decided subsequent to *Machinists*, it is apparent that at least two courts of appeals are not persuaded that this Court has settled the issue. Thus, whatever the merits of those decisions, they at least demonstrate that there is considerable conflict and confusion among the circuits as to the extent to which the Board may rely upon events which occurred more than six months prior to the filing of an unfair labor practice charge in order to determine whether a violation has occurred within that six-month period.

each case that such allegedly unlawful acts as had occurred in the six-month period were too "insubstantial" to constitute an unfair labor practice, and that Section 10(b) precluded a finding of a violation based entirely on the earlier events. These cases merely stand for the proposition that there can be no unfair labor practice finding in the absence of some act (or failure to act) within the six-month period which constitutes a violation of the statute. They do not involve the question presented in this case, which is whether the Board may look to earlier events to determine whether an act (or failure to act) which *has* occurred within the six-month period was or was not unlawful.

Of the three cases referred to above, only *News Printing Co.*, 116 N.L.R.B. 210 (1956), dealt with this issue. There the allegation was that the employer had discriminatorily denied wage increases to certain employees because of their union activities. The evidence drawn from the six-month period showed only that certain employees had in fact been denied wage increases, but not the reason or motive for that denial. However, a prior Board decision in an earlier case had found the same employer guilty of discriminating against the same employees, and others, because of their union activities, and such prior discriminatory conduct had included refusals to grant wage increases to union supporters. On the basis of these prior findings, the Trial Examiner concluded that the employer had simply repeated the same pattern of unlawful conduct. The Board held, however, that while the earlier decision "was admissible as background evidence, it was improper for the Trial Examiner to give it independent and controlling weight in determining whether the Respondent had discriminatorily denied wage increases to the Charging Parties in violation of the Act." *Id.* at 212.

On the other hand, the Board, in subsequent cases, has reached the opposite result on almost identical facts. For example, in *Paramount Cap Mfg. Co.*, 119 N.L.R.B. 785 (1957), *enforced*, 260 F.2d 109 (8th Cir. 1959), the

employer was found guilty of discriminatorily denying re-employment to two laid-off employees, although the only evidence of a discriminatory motive was contained in the record of a prior Board proceeding which showed that more than six months prior to the filing of the charge the employer had expressed hostility toward the Union, and had threatened reprisals for union activity. The only difference between *Paramount* and *News Printing* was that in the former case the employer had offered an innocent explanation for his actions, which the Trial Examiner had discredited, while in the latter case the employer had offered no evidence at all. The Board attempted to use this difference as a basis for distinguishing the cases, but it is clear that in both cases the only affirmative evidence of the discriminatory motive, which was an essential element of the violation, consisted of actions or statements of the employer which had occurred prior to the Section 10(b) period. Yet in one case the Board found a violation, and in the other it refused to do so. In two subsequent cases involving essentially similar facts, the Board followed *Paramount* rather than *News Printing*. *Dan River Mills, Inc.*, 125 N.L.R.B. 1006 (1959); *Newton Falls Paper Mill, Inc.*, 144 N.L.R.B. 1470 (1963). See also *Banner Die Fixture Co.*, 109 N.L.R.B. 1401 (1954), 115 N.L.R.B. 1692 (1956), *enforced*, 42 L.R.R.M. 2604 (6th Cir. 1958).

In other types of cases the Board has similarly found unfair labor practices to have occurred within the limitations period, although essential elements of the violations involved could be proved only by using evidence which antedated that period. Thus, for example, the Board has held picketing to be unlawful because its "object" was to obtain recognition, although the unlawful object was proved entirely by evidence of events occurring more than six months prior to the filing of the charge. *E.g.*, *General Teamsters Union Local 912*, 120 N.L.R.B. 1577 (1958); *Paint, Varnish & Lacquer Makers Union*, 120 N.L.R.B. 1425 (1958). The Board has also held unlawful a job referral system which gave preferential rights to employees with longer service, because it was shown that the

parties in the past – prior to the Section 10(b) period – had discriminatorily given preferential employment rights to union members. Thus, what appeared on its face to be a non-discriminatory seniority system was shown, by evidence of events which had occurred outside the limitations period, to constitute a method of perpetuating a discriminatory system. *Local 269, Int'l B'hd of Elec. Workers,* 149 N.L.R.B. 768 (1964), *enforced,* 357 F.2d 51 (3d Cir. 1966). On the other hand, in *Bowen Products Corp.,* 113 N.L.R.B. 731 (1955), the Board reached the opposite result in an analogous situation.

In short, the decisions of the Board are as confused and inconsistent as the decisions of the courts of appeals. It is thus apparent that this important area of the law can be clarified only by this Court.

III

The importance of the question presented in this case is demonstrated by the frequency with which it has arisen in litigation under the National Labor Relations Act. As the cases canvassed above make clear, there are many unfair labor practices which are difficult or impossible to prove without reliance on evidence of events which have occurred prior to the six-month limitations period. There are at least two reasons why this is so. First, there are many unfair labor practices which require a showing of motive, intent, object, or purpose. These elements cannot usually be proved by direct evidence; they must be inferred from a pattern or course of conduct, which frequently extends over a long period of time. Second, the problem is exacerbated by the fact that the limitations period prescribed by the National Labor Relations Act is only six months, which is much shorter than that prescribed by most statutes of limitations. The issue involved in the present case, therefore, is much more likely to arise under the National Labor Relations Act than under most other statutes.

It follows that the enforcement of the substantive provisions of the Act will likely be seriously hampered until the issue presented here is finally resolved. The present confused state of the law tends to encourage litigation even in cases where the substantive violation is clear, simply because of the possibility that the Board or a court may ultimately find that the case is time-barred. Moreover, the General Counsel of the Board himself is not now in a position to determine with certainty whether a charge is or is not timely under Section 10(b). In some cases, therefore, he may erroneously refuse to issue a complaint when one is warranted, thus finally foreclosing the enforcement of the Act in the particular case. An example of a situation in which this almost occurred is *Swift Service Stores, Inc.*, 169 N.L.R.B. No. 33, 67 L.R.R.M. 1181 (Jan. 26, 1968), where the charge was originally dismissed by the General Counsel on the ground that it was time-barred. Thereafter, the charging party took the unusual step of requesting the General Counsel to reconsider his action, whereupon the General Counsel reversed his earlier decision, and issued a complaint. *Id.* at 1183-1184. The Board ultimately found a violation, but in doing so it had to struggle not only with the Section 10(b) issue, but also with the question of the General Counsel's power to reverse himself after originally dismissing a charge.

The limitations proviso of Section 10(b) has been a part of the statute since 1947. Although it has been the subject of much litigation, the cases have served more to confuse than to clarify the issue of whether, and to what extent, the Board may rely on evidence dating from before the limitations period to determine whether a violation has occurred within that period. This Court decided one aspect of that problem in the *Machinists* case; the present case presents the other aspect of the problem, which was expressly left open in Machinists. This issue, as we have seen, has arisen frequently, and has been the subject of inconsistent and conflicting decisions by both the Board

and the courts. It is a question of fundamental importance in the administration of the National Labor Relations Act. It should now be decided by this Court.

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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